

DOUGLAS STENZEL - SBN 75421
Law Office of Douglas Stenzel
1111 Tahquitz Canyon Way, Suite 121
Palm Springs, California 92262
Telephone: 760/318-8383
Facsimile: 760/318-8393

Attorneys for: Plaintiff Christopher Upham

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER UPHAM,

Plaintiff,

vs.

THE PERSONAL REPRESENTATIVE
OF THE ESTATE OF PETER M. FOX,
deceased; HELENA F. FOX, and the
Guardian Ad Litem(s) for
REBECCA H. FOX and ROBERT G. FOX,
Minors,

Defendants.

CASE NO.

**COMPLAINT FOR BREACH OF
CONTRACT; BREACH OF
FIDUCIARY DUTY; CONVERSION;
INTENTIONAL
MISREPRESENTATION;
NEGLIGENT MISREPRESENTATION;
CONCEALMENT OF MATERIAL
FACTS; CONSPIRACY TO BREACH
FIDUCIARY DUTY; CONSPIRACY
TO CONVERT; CONSPIRACY TO
DEFRAUD; ACCOUNTING;
UNJUST ENRICHMENT;
INJUNCTION; CONSTRUCTIVE
TRUST; AND FRAUD AND
MISREPRESENTATION**

JURY TRIAL DEMANDED

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PARTIES

1
2 1. Plaintiff Christopher Upham is a citizen and resident of the State of California and
3 resides within the jurisdiction of the Federal District Court for the Northern District of
4 California.

5 2. Defendant Helena F. Fox is a citizen and resident of the State of South Carolina.

6 3. Defendant Rebecca H. Fox is a minor and is a citizen and resident of the State of
7 South Carolina.

8 4. Defendant Robert G. Fox is a minor and is a citizen and resident of the State of
9 South Carolina.

10 5. Upon information and belief, the personal representative of the Estate of Peter M.
11 Fox, deceased, to be appointed will be a citizen and resident of the State of South Carolina.

12 6. Upon information and belief, the guardian ad litem(s) for Rebecca H. Fox and
13 Robert G. Fox, minors, will be citizen(s) and resident(s) of the State of South Carolina.

14 7. Peter M. Fox, deceased, died on December 25, 2001, a resident and citizen of the
15 State of South Carolina (hereafter referred to as "the decedent").

16 **LITIGATION HISTORY**

17 8. On September February 25, 1999, Upham filed a civil complaint against the
18 decedent and others in the Superior Court for the State of California, for the County of Sonoma.
19 The complaint alleged breach of contract; breach of fiduciary duty; conversion; intentional
20 misrepresentation; negligent misrepresentation; concealment of material facts; conspiracy to
21 breach fiduciary duty; conspiracy to convert; conspiracy to defraud; accounting; and unjust
22 enrichment.

23 9. The complaint referred to above bore the case number: SCV 221109. The
24 decedent moved the Sonoma County Superior Court for an order to stay the proceedings. On
25 November 6, 2000, the court ordered a stay of proceedings pursuant to the provisions of
26 *California Code of Civil Procedure §418.10(a)(2)*, whereby the court retained jurisdiction of the
27 litigation if Costa Rica proved to be an unsuitable forum, if decedent was not subject to the
28

1 jurisdiction of the Costa Rican courts **or if some other material fact compels such action.**
2 (Emphasis added.)

3 10. Plaintiff Upham thereafter filed litigation against decedent in the Third Civil
4 Court of Major Claims of the First Civil Circuit of San Jose; case number 96-000122-182 CI-4.
5 The litigation resulted in favor of plaintiff Upham in the Lower Court Decision No. 30-04.
6 Decedent appealed the decision of the lower court and in May 2005, the Tribunal Segundo Civil
7 (Second.Civil Court) in Case No. 96-000122-182-CI reversed in part the lower court decision,
8 however, did not resolve all of the issues and allegations in Case No. SCV 221109, venued in the
9 Sonoma County Superior Court.

10 11. On May 22, 2007, the legal representatives of decedent filed a Motion to Dismiss
11 Case No. SCV 221109 on the grounds that Peter M. Fox died on December 25, 2001; plaintiff
12 never filed a motion pursuant to California *Code of Civil Procedure* §377.41; plaintiff failed to
13 file a creditor's claim against the estate of decedent Fox; and the Estate of Fox was closed on
14 November 4, 2003. The court denied the Motion to Dismiss the action.

15 12. On September 10, 2007, plaintiff Upham filed a Motion to Lift the Stay of
16 Proceedings in Case No. SCV 221109. The court (different judge) denied plaintiff Upham's
17 motion and entered an Order to Show Cause Why The Case Should Not Be Dismissed.

18 13. Due to the conflicting rulings made by different judges of the Sonoma County
19 Superior Court, plaintiff Upham filed on February 19, 2008, a Request for Dismissal Without
20 Prejudice of Case No. SCV 221109. The case was dismissed without prejudice as requested by
21 plaintiff Upham.

22 14. Plaintiff Upham now brings this action against The Personal Representative of the
23 Estate of Peter M. Fox, deceased, Helena F. Fox, and the Guardian Ad Litem(s) for Rebecca H.
24 Fox and Robert G. Fox, Minors, based upon the allegations stated herein.

25 JURISDICTION AND VENUE

26 15. This action is subject to the Constitution of the United States, Article III,
27 Section 2.

1 defendant, Peter M. Fox's, previous association in said state.

2 23. On June 4, 2003, plaintiff's attorney received a telephone call from Rafael A. Quiros
3 regarding the need and legal basis for a Certified Death Certificate.

4 24. On June 6, 2003, plaintiff's attorney received a telephone call from Angel Poston
5 representing the State of South Carolina of Vital Records. Upon information and belief she stated
6 that since Mr. Upham was not a relative, the State of South Carolina required a Subpoena to obtain
7 Mr. Fox's Death Certificate, if it existed in said State.

8 25. On May 22, 2007, defendant filed a Motion to Dismiss for failure to file a motion
9 per California *Code of Civil Procedure* §377.41, to continue the above-referenced case against the
10 personal representative or successor-in-interest of Peter M. Fox. Defendants further based the
11 motion on plaintiff's failure to file a Creditor's Claim in the estate of defendant Peter M. Fox in a
12 South Carolina Probate Court in the State of South Carolina.

13 26. Defendant's representative filed publication of notice on January 17, 2002.
14 Defendant's attorneys did not notify defendant's largest creditor and orchestrated a scheme and plan
15 to withhold such critical information to plaintiff, including but not limited to, defendant's death on
16 December 25, 2001, and the publication of notice in probate filed in South Carolina.

17 27. Said withholding of critical information necessary to file a claim in South Carolina
18 and file a Motion in this case was prejudiced by the overt acts and plan to file a "quick probate" to
19 prevent plaintiff Christopher Upham from complying with South Carolina probate statutes and
20 California statutes requiring a claim to be made within a year of death.

21 28. Defendant's attorneys and representative consciously "manipulated" both State court
22 systems and the Country of Costa Rica to prevent plaintiff from asserting his rights against the
23 representatives and heirs of Peter M. Fox, deceased. They failed to notify the South Carolina court
24 of this action and as such misrepresented the material facts to the probate court of South Carolina.
25 This was done to prevent plaintiff from obtaining knowledge of Mr. Peter M. Fox's death.
26 Additionally, they failed to notice the court and plaintiff's counsel that their client, Peter M. Fox,
27 was deceased, and only felt obligated to respond to plaintiff's attorney's request after the
28 appropriate statutes had expired.

29. The acts of defendant's attorneys and representatives were calculated to prejudice plaintiff by withholding material and critical information to plaintiff and to the South Carolina, California and Costa Rican judicial systems.

30. Representatives of the deceased contended that plaintiff failed to file a creditor's claim in the South Carolina Probate and such failure forever barred bringing or maintaining a suit against a deceased defendant (citing South Carolina Probate Law §62-3-801(a) and § 62-3-803). This contention is wholly **not** supported by South Carolina Probate Law.

31. South Carolina Probate Law §62-3-804(2) provides as follows:

"Claims against a decedent's estate may be presented as follows:

...

(2) The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim, and the claimant must file a written statement of the claim as in (1) above, with the clerk of the probate court. **No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his death.** (Emphasis added.)

32. Clearly, all interested parties and counsel were well aware of the pending action in the Superior Court for the County of Sonoma. No creditor's claim is required in South Carolina as to proceedings pending before a deceased dies.

33. The decedent's personal representative, Helena F. Fox, and counsel had an absolute duty to notify plaintiff of the death of defendant Peter M. Fox. They did not. *South Carolina Rules of Civil Procedure, Rule 25*. SUBSTITUTION OF PARTIES provides as follows:

"(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided by Rule 4 for the service of summons. If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party. **Counsel of**

1 record for such deceased party shall give notice to all other
 2 parties of the death of such party as soon as practicable
 3 after obtaining such knowledge and of the name and
 4 address of the proper parties who should be substituted.”
 (Emphasis added.)

5 34. The decedent’s personal representative and counsel had an absolute duty to notify
 6 plaintiff of the petition for settlement and closure of the Fox probate according to *South Carolina*
Probate Law § 62-3-1001(a)(4):

7 “(4) proof that a notice of right to demand hearing and copies of
 8 the account, the proposal for distribution, and the petition for
 9 settlement of the estate have been sent to all interested persons
 including all creditors or other claimants of whom the personal
 representative is aware whose claims are neither paid nor barred.”

10 35. The decedent’s personal representative and counsel failed to give notice to
 11 plaintiff of his right to demand a hearing, failed to give plaintiff copies of the account, and failed
 12 to give plaintiff the proposal for distribution of the Fox Estate. In essence, by not complying
 13 with the South Carolina Probate Law, a fraud was perpetrated on the South Carolina Probate
 14 Court.

15 36. Plaintiff is not without remedy in South Carolina. *South Carolina Probate Law*
 16 *§62-3-1008* provides for reopening and subsequent administration:

17 “If other property of the estate is discovered after an estate has
 18 been settled and the personal representative discharged or for
other good cause, the court upon petition of any interested person

19 and upon notice as it directs may appoint the same or a successor
 20 personal representative to administer the subsequently opened
 21 estate. If a new appointment is made, unless the court orders
 otherwise, the provisions of this Code apply as appropriate; but no
 claim previously barred may be asserted in the subsequent
 administration.”

22 (Emphasis added.)

23 37. Plaintiff herein certainly has good cause to reopen the South Carolina probate.

24 38. Under South Carolina Probate Law, plaintiff has rights to recover as a creditor
 25 against the South Carolina personal representative, as shown in *South Carolina Probate Law*
 26 *§62-3-1005*:

27 “Unless previously barred by adjudication and except as provided
 28 in the accounting, the rights of successors and of creditors whose
 claims have not otherwise been barred against the personal
 representative for breach of fiduciary duty are barred unless a

proceeding to assert the same is commenced within six months after the filing of the account, proposal for distribution of the estate, petition for settlement of the estate, and proof required by Section 62-3-1001. **The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.** (Emphasis added.)

39. It is clear that in this case there was not only misrepresentation and inadequate disclosure related to the settlement of the decedent's estate, but also fraud.

40. The distributees of the Fox Estate have liability for any judgment in this case. *South Carolina Probate Law §62-3-1004* provides for liability of distributees to plaintiff herein:

"After assets of an estate have been distributed and subject to § 62-3-1006, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees. No distributee shall be liable to claimants for amounts received as exempt property or for amounts in excess of the value of his distribution as of the time of distribution. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration. Any distributee who shall have failed to notify other distributees of the demand made upon him by the claimant was asserted against him loses his right of contribution against other distributees."

41. *California Probate Code §9103* provides that plaintiff must file a creditor's claim within four months from the date of issuance of letters. In this case, plaintiff had no knowledge of defendant's death within the four-month window period.

42. Upon information and belief, Notice to Creditors was published in The Beaufort Gazette on January 17, 2002, January 24, 2002, and January 31, 2002.

43. There was a total lack of compliance with *California Probate Code §9050*, which states as follows:

"(a) Subject to Section 9054, the personal representative shall give notice of administration of the estate to the known or reasonably ascertainable creditors of the decedent. The notice shall be given as provided in Section 1215. For the purpose of this subdivision, a personal representative has knowledge of a creditor of the decedent if the personal representative is aware that the creditor has demanded payment from the decedent or the estate.

(b) The giving of notice under this chapter is in addition to the publication of the notice under Section 8120." (Emp. add.)

44. The decedent's estate, through his personal representative, should not be allowed

1 to profit from the failure to give actual notice of death to plaintiff. California has a long history
 2 of applying the doctrine of equitable estoppel in situations such as those presented by the facts of
 3 this case. In 1998, the California Court of Appeal decided the case of Battuello v. Battuello 64
 4 Cal.App.4th 842, 75 Cal.Rptr.2nd 548. The court gives an extensive analysis of the applicability
 5 of equitable estoppel in Battuello:

6 “While section 366.2 clearly states that the one-year statute of
 7 limitations set forth therein may not be ‘tolled’ or ‘extended,’ it
 8 says nothing about equitable estoppel. (3) The doctrines are
 9 distinct. As one court noted in a similar context, ‘Tolling, strictly
 10 speaking, is concerned with the point at which the limitations
 11 period begins to run and with the circumstances in which the
 12 running of the limitations period may be suspended. These are
 13 matters in large measure governed by the language of the statute of
 14 limitations itself. . . . Equitable estoppel, however, is a different
 15 matter. It is not concerned with the running and suspension of the
 16 limitations period, but rather comes into play only after the
 17 limitations period has run and addresses itself to the circumstances
 18 in which a party will be estopped from asserting the statute of
 limitations as a defense to an admittedly untimely action because
 his conduct has induced another into forbearing suit within the
 applicable limitations period. It’s application is wholly
 independent of the limitations period itself and takes its life, not
 from the language of the statute, but from the equitable principle
 that no man will be permitted to profit from his own wrongdoing in
 a court of justice. Thus, because equitable estoppel operates
 directly on the defendant without abrogating the running of the
 limitations period as provided by statute, it might apply no matter
 how unequivocally the application limitations period is express.’
 (*Bomba v. W. L. Belvidere, Inc.* (7th Cir. 1978) 579 F.2d 1067,
 1070.)”

19 (At pp 847, 848)

20 45. The Costa Rican case of *Fox v. Upham and Upham v. Fox*, Case No.: 96-000122-
 21 182CI, is still pending in Large Claim Third Civil Court of San Jose. Neither the deceased nor
 22 his personal representative has fully complied with the order of The First Chamber of the
 23 Supreme Court of Justice of Costa Rica to provide a forensic accounting to the court and to
 24 plaintiff Upham.

25 46. The Costa Rican courts were never notified by Fox’s counsel or the personal
 26 representative of his estate that Fox died on December 25, 2001. A succession proceeding
 27 (probate equivalent) has been opened in Costa Rica as Case No.: 03000517-185 in the Sixth
 28 Civil Court of San Jose.

1 and in return Upham would receive fifty percent of the stock of the corporations. In return for
2 his investment, The Decedent assured Upham that he would have the land base necessary for his
3 scuba diving business. The Decedent told Upham that title to a portion of the Zona Uno property
4 would be transferred to Upham.

5 51. In return for contributing his option on the land to the VAMSA Corporations and
6 providing his expertise as an architect and developer who had extensive knowledge of Costa
7 Rica, The Decedent would get the remaining fifty percent of the stock of the corporations. The
8 Decedent told Upham that The Decedent would manage all aspects of the affairs of the
9 corporations and would arrange for the development and sale of the property. The Decedent was
10 to arrange for the sale of the middle section of the property (which was to be initially acquired
11 and held by Ventana al Mar) to a developer for no less than \$500,000. Three hundred thousand
12 dollars (\$300,000) of the proceeds of the sale would be used to pay off the remaining mortgage
13 due Bustos for the property and the remainder of the funds was to be deposited in the accounts of
14 Zona Uno and Zona Dos.

15 52. The Decedent repeatedly told Upham that based on his expertise and experience
16 with developing property in Costa Rica, he was certain that Ventana al Mar could be sold to a
17 developer for more than \$500,000 and that the Zona Uno and Zona Dos properties would more
18 than double in value after the sale of Ventana al Mar; and Upham's investment would yield a
19 return of between \$600,000 to \$1,500,000.

20 53. The Decedent also assured Upham that he would not be required to take an active
21 role in the development or sale of the property. The Decedent was aware that Upham did not
22 have the time or expertise necessary to actively market or develop the property as Upham
23 intended to purchase and refurbish a commercial boat for his scuba diving operation as well as
24 set up and market the dive operation, including getting the necessary licenses from the Costa
25 Rican government. The Decedent represented to Upham that in consideration for his fifty
26 percent of the shares of the VAMSA Corporations, The Decedent would handle all details
27 relating to the development and sale of the property including locating potential developers and
28 buyers, preparing marketing materials, administering, overseeing, and managing the property.

1 Additionally, The Decedent told Upham that he would provide Upham with accurate monthly
2 accounting for the VAMSA Corporations.

3 54. From approximately May 1991 to December 1991, The Decedent repeatedly
4 called and sent correspondence to Upham in Santa Rosa, California, to solicit Upham's
5 investment in the VAMSA Corporations. The Decedent repeated the statements made during his
6 initial meeting with Upham including, but not limited to, his representations that The Decedent
7 had a \$600,000 option on the property; the property was owned by Bustos; title to the property
8 was "clean;" Marin had confirmed that title to the property was unencumbered; Upham's
9 investment would ensure him of a land base for his scuba diving business; Upham would be
10 given title to a portion of the Zona Uno property to set up his scuba diving business; Upham
11 would not be required to take an active role in the development, marketing and sale of the
12 property; The Decedent would provide Upham with accurate monthly accountings, the
13 development and sale of the Ventana al Mar property would more than double the value of the
14 Zona Uno and Zona Dos parcels; and that based on The Decedent's expertise in Costa Rican real
15 estate development, Upham's investment in the VAMSA Corporations would result in a
16 minimum profit to Upham of \$600,000 to \$1,500,000.

17 55. In or about December 1991, Upham wired \$300,000 to Ventana al Mar's bank
18 account in Miami, Florida. In consideration for his investment, Upham received fifty percent of
19 the shares of the VAMSA Corporations.

20 56. Upham is informed and believes, and on that basis alleges, that Upham's funds
21 were used by The Decedent, who is an officer of the VAMSA Corporations, as a down payment
22 to purchase the property from Bustos on behalf of the VAMSA Corporations. Title to the
23 property was divided between the VAMSA Corporations. Zona Uno acquired title to the
24 beachfront section of the property; Ventana al Mar acquired title to the middle section of the
25 property; and Zona Dos acquired title to the inland section of the property. The Decedent, on
26 behalf of the VAMSA Corporations, entered into an agreement to pay Bustos the \$300,000
27 balance of the purchase price by April 15, 1992.

1 57. Upham is informed and believes, and on that basis alleges, that Upham's funds
2 were used by The Decedent to pay \$35,000 to Marin and Marschu for allegedly investigating and
3 confirming that the property was unencumbered.

4 58. On or about January 10, 1992, The Decedent and Upham entered into a written
5 contract regarding Upham's investment in the VAMSA Corporations, a true and correct copy of
6 which is attached hereto as Exhibit "A" and incorporated herein by this reference. Pursuant to
7 the contract, The Decedent agreed to arrange for the sale of Ventana al Mar to a developer as
8 soon as possible for a price in excess of \$400,000. The Decedent also agreed that he would be
9 responsible for providing the funds to pay off the remaining \$300,000 purchase price debt. If the
10 stock of Ventana al Mar was sold before the date on which the purchase price debt became due,
11 the funds of the sale would be used to retire the debt.

12 59. In or about April 1992, Upham learned that title to the property was not "clean."
13 Upham was informed that Bustos did not have clear title to the property, but rather that a Mr.
14 Stirling had a senior interest in the property and had filed suit in Costa Rica to block the transfer
15 of title to the VAMSA Corporations. When Upham raised this issue with The Decedent, he was
16 told not to worry about Stirling's claim, but that in order to protect his investment, Upham would
17 have to pay a bribe to the Costa Rican court clerk in order to stall the prosecution of Stirling's
18 claim.

19 60. Also in or about April 1992, The Decedent informed Upham that he was having
20 difficulty raising the additional \$300,000 needed to retire the debt on the property and was not
21 able to put together a deal for the sale of the shares of Ventana al Mar for a price in excess of
22 \$400,000, as previously agreed.

23 61. In April 1992, The Decedent informed Upham that without Upham's knowledge
24 or approval, on or about April 15, 1992, The Decedent had entered into an agreement with Grau
25 and his company, ITL, to sell the property held by Ventana al Mar to ITL for \$400,000. The
26 Decedent told Upham that Grau would transfer \$300,000 to the VAMSA Corporation's account
27 when title to the property had been cleared, and the remaining \$100,000 at an unspecified later
28 date. The Decedent further informed Upham that The Decedent and Grau also agreed that The

1 Decedent and Upham would retain an option to resell the property in an amount in excess of
2 \$500,000 by January 1, 1993. If The Decedent or Upham arranged a deal to resell the property
3 by January 1, 1993, then Grau would receive the first \$500,000 and all remaining proceeds
4 would be split between The Decedent, Grau and Upham.

5 62. Upham refused to consent to such an arrangement as it violated both written and
6 oral agreements between The Decedent and Upham. Moreover, when Upham insisted on seeing
7 the written agreement between The Decedent and Grau, he discovered that The Decedent's
8 representations were in fact false, and that The Decedent had agreed to sell Grau both the
9 property held in Ventana al Mar and the property held by Zona Uno and Zona Dos.

10 63. After Upham discovered The Decedent's attempt to sell property held by Zona
11 Uno and Zona Dos without Upham's knowledge, The Decedent informed Upham that on or
12 about May 12, 1992, The Decedent further agreed to pay Grau a percentage of ownership of the
13 Zona Uno property. Any proceeds from the resale of the Ventana al Mar property by Upham or
14 The Decedent arranged prior to January 1, 1993 in excess of \$500,000 would be deposited in the
15 account of Zona Uno.

16 64. The Decedent's revised agreement with Grau again violated oral and written
17 agreements with Upham as the sale price to Grau did not exceed \$400,000 nor did Grau have the
18 experience necessary to develop the property such that Zona Uno or Zona Dos properties would
19 increase in value.

20 65. The Decedent told Upham that if he did not consent to the agreement The
21 Decedent had reached with Grau that Upham's investment would be jeopardized because The
22 Decedent would be unable to raise the funds necessary to pay off the Bustos mortgage or
23 otherwise clear title to the property. The Decedent told Upham that unless he agreed to the
24 agreement with Grau that Bustos would foreclose on the property and Upham would lose his
25 entire investment.

26 66. Under pressure from The Decedent and in an effort to prevent the loss of his
27 \$300,000 investment, on July 19, 1992, Upham entered into a written agreement with Grau's
28

1 company, ITL, and The Decedent in Miami, Florida, a true and correct copy of which is attached
2 hereto as Exhibit "B." Pursuant to the terms of the agreement, The Decedent and Upham agreed
3 to sell ITL their shares in Ventana al Mar for a total price of \$400,000. ITL (through Grau)
4 agreed to pay Upham and The Decedent each \$75,000 upon proof of clear title to the Ventana al
5 Mar property. Twenty days after title had been registered in the name of ITL, ITL agreed to pay
6 Upham an additional \$60,000 and to pay The Decedent an additional \$90,000. ITL agreed to
7 pay the remaining \$100,000 to The Decedent when the property was sold to a third party for a
8 price in excess of \$500,000. ITL also agreed to give Upham and The Decedent an option to
9 resell the property to a third party for not less than \$500,000 by April 1, 1993. If Upham or The
10 Decedent arranged such a resale of the property, all funds in excess of \$500,000 from the resale
11 would be deposited in the account of Zona Uno.

12 67. Upham is informed and believes, and on that basis alleges, that in or about July
13 1992, The Decedent used VAMSA Corporation's funds to secure Stirling's title and remove his
14 \$125,000 claim. In addition, despite the fact that Bustos did not have valid title to the property,
15 The Decedent used VAMSA Corporation funds to pay Bustos an additional \$31,481.

16 68. Upham is informed and believes, and on that basis alleges, that despite having
17 cleared title to the property, Grau did not complete payment on the purchase price of the shares
18 of Ventana al Mar as required. The Decedent conspired with Grau to conceal this non-payment
19 from Upham. On or about October 10, 1992, The Decedent informed Upham in writing that
20 Grau had completed all payment for the sale of Ventana al Mar with the exception of \$41,000
21 that Grau owed directly to The Decedent. The Decedent also informed Upham that all legal fees
22 in connection with the sale of Ventana al Mar and clearing title to the property had been paid.
23 Upham later discovered that both these representations were false. In June 1994, Upham
24 discovered for the first time that the legal fees had not been paid, and in June 1998, The
25 Decedent admitted in a Costa Rican deposition that in fact Grau did not pay the \$300,000 for the
26 purchase of Ventana al Mar property.

27 69. Upham repeatedly asked The Decedent for accurate accountings detailing the
28 income and expenses of the VAMSA Corporations. Despite Upham's requests, The Decedent

1 delayed sending Upham any accountings and when he finally did send accountings to Upham,
2 they were inaccurate, inconsistent and designed to hide from Upham the fact that The Decedent
3 and Grau had conspired to defraud Upham of his share of the proceeds from the sale of Ventana
4 al Mar.

5 70. In or about March 1993, The Decedent again informed Upham that Grau had paid
6 the initial \$400,000 purchase price in full and that The Decedent would send Upham an
7 accounting confirming this in two weeks. The Decedent then asked Upham to sign over his
8 shares of Ventana al Mar to Grau as an act of "good faith." On or about March 23, 1993, at The
9 Decedent's request and assurance that Grau had satisfied his obligations under the contract,
10 Upham transferred his shares of Ventana al Mar to Grau. Despite transferring his shares of
11 Ventana al Mar, Upham did not receive any accountings from The Decedent until September
12 1993, nor did Upham receive his portion of the proceeds of the sale of Ventana al Mar. In or
13 about January 1995, Upham learned for the first time that The Decedent's representations were
14 false in that Grau had not made the initial \$300,000 purchase payment. Additionally, Upham
15 learned that the accountings sent by The Decedent to Upham were fraudulent.

16 71. Upham is informed and believes, and on that basis alleges, that despite the fact
17 that Upham has transferred his shares of Ventana al Mar to Grau, neither Grau nor ITL has ever
18 satisfied its obligations to make the full \$400,000 payment.

19 72. Upham is informed and believes, and on that basis alleges, that Grau and The
20 Decedent conspired to defraud Upham of his right share of the purchase price of Ventana al Mar
21 and his shares of Ventana al Mar.

22 73. Additionally, as early as April 1993, The Decedent attempted to coerce Upham to
23 transfer his ten percent (10%) share of Zona Uno and Zona Dos to The Decedent. Grau began to
24 coerce Upham in March 1994 to also transfer the stock to The Decedent. Both The Decedent
25 and Grau then began to coerce Upham to accept boundary changes in the properties that would
26 have defrauded Upham of land contained in Zona Uno, and benefited Grau. Upham refused to
27 bow to The Decedent and Grau's pressure.

28 74. Upham is informed and believes, and on that basis alleges, that rather than devote

1 his time and energies to managing, developing, and marketing the VAMSA Corporation's
2 properties, The Decedent devoted his time and energies and used the VAMSA Corporation funds
3 to market and develop other properties held by other The Decedent controlled corporations to the
4 detriment of the VAMSA Corporations. Additionally, The Decedent used VAMSA
5 Corporations' assets for the benefit of his other companies, including, but not limited to, HEI,
6 Costa Rica Offshore, and Rancho Cartagena, without Upham's knowledge or consent.

7 75. Upham is informed and believes, and on that basis alleges, that The Decedent
8 used the funds invested by Upham in the VAMSA Corporations for his personal account without
9 the consent or knowledge of Upham.

10 76. Upham is informed and believes, and on that basis alleges, that rather than deposit
11 whatever monies, if any, were received from Grau for the sale of Ventana al Mar into the
12 VAMSA Corporations' accounts, The Decedent deposited such funds in his personal bank
13 account without Upham's knowledge or consent.

14 77. Upham is informed and believes, and on that basis alleges, that The Decedent
15 engaged the service of other companies controlled by The Decedent to perform work for the
16 VAMSA Corporations without disclosing this fact to Upham. Moreover, The Decedent used the
17 funds invested by Upham to pay other The Decedent controlled companies for work never
18 performed on behalf of the VAMSA Corporations.

19 78. Upham is informed and believes, and on that basis alleges, that The Decedent
20 mismanaged the affairs of the VAMSA Corporations such that no development deal was ever
21 possible. Because of The Decedent's mismanagement, Ventana al Mar's corporate bank account
22 maintained in Miami, Florida and used as a credit reference for potential developers interested in
23 the VAMSA Corporations' properties was closed for insufficient funds. The Decedent hid this
24 fact from Upham such that Upham continued to use the Ventana al Mar account as a credit
25 reference for potential developers. As a result, no developers would seriously pursue a deal with
26 VAMSA Corporations.

27 79. Beginning in January 1992, and continuing to the date of the filing of this
28 complaint, Upham repeatedly requested that The Decedent provide him with accurate monthly

1 accountings per The Decedent's previous representations. Despite Upham's numerous requests,
2 The Decedent provided Upham with only sporadic, inaccurate, and inconsistent accountings.
3 When The Decedent finally did send accountings to Upham, The Decedent represented that the
4 corporations' expenses had exceeded their income and requested Upham send him additional
5 funds to pay the corporations' expenses. In response to The Decedent's request, Upham sent
6 The Decedent approximately an additional \$7,000.

7 80. Upham is informed and believes, and on that basis alleges, that from October
8 1991 until present, The Decedent had failed to provide current or accurate accountings despite
9 his repeated representations that he would do so. The accountings provided by The Decedent to
10 Upham were inaccurate, inconsistent and calculated to deceive Upham and cover up the fact that
11 The Decedent had conspired with Bustos, Marin and Grau to defraud Upham of his investment.

12 81. Despite Upham's repeated requests for documentation supporting the accountings
13 which The Decedent sent to Upham, including receipts and cancelled checks, The Decedent has
14 refused to send Upham such documentation.

15 82. Upham also requested that Grau provide him with documentation that Grau had in
16 fact completed payment for Ventana al Mar. Grau refused to send Upham such documentation
17 and continues to refuse to send Upham documentation.

18 83. Upham is informed and believes, and on that basis alleges, that at the time Bustos
19 "sold" the property to the VAMSA Corporations, he owned one of the adjoining parcels of
20 property. The Decedent was aware of this fact and failed to inform Upham of such a fact. The
21 Decedent and Bustos conspired to keep Upham ignorant of this fact so that Upham would agree
22 to invest in the VAMSA Corporations and not perform any additional investigations into Bustos'
23 alleged title to the property. If Upham were aware of this fact, he would have conducted further
24 investigation into Bustos' alleged interest in the property and would have discovered that Bustos
25 did not have clear title to the property and would not have invested in the VAMSA Corporations.

26 84. Upham is informed and believes, and on that basis alleges, that at the time Marin
27 allegedly investigated Bustos' title to the property and confirmed that Bustos had clean title to
28 the property, Marin also had an interest in an adjoining parcel. The Decedent was aware of this

1 fact and conspired with Marin to conceal this fact from Upham so that Upham would rely on The
2 Decedent and Marin's representations that title to the property was "clean." Had Upham been
3 aware of the fact that Marin had an interest in the adjoining property, Upham would not have
4 relied on The Decedent and Marin's representations regarding the status of the title of the
5 property and would not have invested in the VAMSA Corporations.

6 85. Despite the fact that Upham was not supposed to have to take an active role in the
7 marketing or developing of the property, in or about 1991, Upham, at The Decedent's urging,
8 approached a group of investors based in San Francisco, California, led by Harry Roth regarding
9 a restaurant development on the Zona Uno property. Roth visited the property and expressed
10 great interest in going forward with the project and requested additional material and information
11 regarding the property. The Decedent told Upham that he would follow up with Roth and that
12 Upham did not have to pursue the matter further.

13 86. Upham is informed and believes, and on that basis alleges, that The Decedent
14 made no effort to pursue a development deal with the Roth group. Roth called Upham numerous
15 times to inform him that he had not yet received any additional information from The Decedent.
16 Upham relayed these concerns to The Decedent, who told him that he would deal directly with
17 Roth. Eventually, Roth informed Upham that because The Decedent had still not sent Roth the
18 requested material or taken any other action to follow up on the proposed project that the Roth
19 group was no longer interested in pursuing the project.

20 87. In or about early 1993, Upham again became concerned that The Decedent had
21 not pursued any deals to resell the Ventana al Mar property pursuant to the option contract with
22 Grau and ITL. Upham repeatedly asked The Decedent whether he was actively pursuing any
23 deals to resell the property before the option lapsed. The Decedent told Upham not to worry as
24 he was on the verge of closing a deal to sell both the Ventana al Mar property and the Zona Uno
25 and Zona Dos properties to a golf course developer. The Decedent also told Upham that Grau
26 was "on board" with the deal and was willing to extend the option period if the deal was not
27 completed by April 1, 1993.

28 88. Concerned that the option period might lapse before The Decedent put together a

1 deal to sell the property and despite the fact that Upham had been assured that he would not have
2 to take an active role in the development or sale of the property, Upham approached other
3 development groups based in California regarding the VAMSA Corporations properties. Each
4 development group expressed interest in the properties and requested marketing materials and
5 additional information. Upham informed The Decedent of these potential development deals and
6 requested that The Decedent prepare and send the requested materials. The Decedent again
7 assured Upham that he would follow up on these prospective deals and that Upham did not have
8 to do anything further with regard to the marketing or development of the property. Once again,
9 The Decedent failed to send the necessary marketing materials to Upham or the potential
10 development groups or otherwise take any action to pursue these deals. Upham repeatedly
11 requested that The Decedent send him marketing materials so that Upham could market the
12 property to developers in California. The Decedent continually delayed sending Upham any
13 marketing materials until September 1993, after the option period had lapsed. Moreover, the
14 marketing materials sent to Upham were below industry standards and could not be used to
15 attract developers in the VAMSA Corporations' property.

16 89. Upham is informed and believes, and on that basis alleges, that despite his
17 representations to the contrary, The Decedent did little or nothing to develop or market the
18 VAMSA Corporations' property. The Decedent did not produce timely or sufficient marketing
19 materials and did not pursue potential development deals.

20 90. Upham is informed and believes, and on that basis alleges, that The Decedent and
21 Grau conspired to delay sending Upham marketing materials and failed to pursue development
22 deals for the Ventana al Mar property in order to allow the option period to lapse so as to defraud
23 Upham out of any interest in the Ventana al Mar property proceeds from its development.

24 91. In reliance on The Decedent's representations that the VAMSA Corporations had
25 clear title to the property and would provide Upham with a land base for his scuba diving
26 business, Upham expended substantial time, energy, and money procuring a tourist license from
27 the Costa Rican government; and purchased and refurbished a commercial boat for his scuba
28 diving business. Also in reliance on The Decedent's representations, Upham expended

1 substantial time and money negotiating an exclusive Costa Rican dealership arrangement with
2 US Divers.

3 92. Because of defendants' misconduct described above, Upham has been forced to
4 devote substantial time and efforts to salvage his investment in the VAMSA Corporations and
5 attempt to market and develop the property to the detriment of his scuba diving business. In
6 addition, the failure of The Decedent to transfer title of a portion of the Zona Uno property, the
7 lack of a secure land base, and the delays in developing the property have resulted in operation of
8 Upham's scuba diving business being delayed with resulting lost profits.

9 93. Plaintiff, Christopher Upham, (hereinafter "Upham") alleges against defendants
10 The Personal Representative of the Estate of Peter M. Fox, Helena F. Fox, and the Guardian Ad
11 Litem(s) for Rebecca H. Fox and Robert G. Fox, Minors (collectively "defendants") as follows:

12 **FIRST CAUSE OF ACTION**

13 **(Breach of Contract)**

14 **(Against The Decedent)**

15 94. Upham repeats, realleges, and incorporates herein by this reference each and
16 every allegation contained in Paragraphs 1 through 93 herein, inclusive.

17 95. Upham's agreements with The Decedent described above were contracts wherein
18 The Decedent agreed to every one of the obligations described.

19 96. Upham has performed all on his part required for it to perform under the
20 agreements, or such performance has been waived or excused.

21 97. The Decedent breached its obligations and continues to breach its obligations to
22 Upham by, among other ways, failing to properly manage, market or develop the VAMSA
23 Corporations' property; entering into an agreement to sell Ventana al Mar property for a price
24 which did not exceed \$400,000; failing to provide Upham with timely or accurate accountings;
25 failure to contribute an option for clear title to the property to the VAMSA Corporations; failing
26 to remit Upham's portion of the proceeds of the sale of Ventana al Mar; and failing to transfer
27 title of a portion of the Zona Uno property to Upham.

28 98. As a proximate result of The Decedent's failure to honor his agreements with

1 Upham, Upham has been damaged in the sum of at least \$3,000,000, plus interest and costs.

2 **SECOND CAUSE OF ACTION**

3 **(Breach of Fiduciary Duty)**

4 **(Against The Decedent)**

5 99. Upham repeats, realleges, and incorporates herein by this reference each and
6 every allegation contained in Paragraphs 1 through 98 herein, inclusive.

7 100. **The Decedent's** relationship with Upham as described above was one of a
8 fiduciary. **The Decedent** has breached his fiduciary duty and continues to breach his fiduciary
9 duty to Upham by, among other things, misrepresenting the status of his option to purchase the
10 VAMSA Corporations' property; failing to disclose the interest of Marin and Bustos in the
11 property; failing to properly manage, market or develop the VAMSA Corporations' property;
12 failing to pursue viable development deals; attempting to change property boundaries of said
13 corporations to defraud Upham of land and benefit **The Decedent** and Grau; mismanaging the
14 VAMSA Corporations' accounts; failing to provide Upham timely or accurate accountings;
15 misleading Upham as to the VAMSA Corporations' cash flow; using the monies invested by
16 Upham for his personal account; using Upham's funds and the VAMSA Corporations' assets for
17 the benefit of **The Decedent's** third party companies; failing to devote his time and energy to the
18 proper management of the VAMSA Corporations; using the services of other **The Decedent**
19 controlled companies without disclosing such information to Upham; reaching an agreement to
20 sell the Ventana al Mar property to the Grau operation despite Grau's lack of a proven track
21 record at developing property; allowing Grau's option to lapse without actively attempting to
22 resell the Ventana al Mar property for a price in excess of \$500,000; entering into agreements
23 with Grau and ITL to the detriment of Upham and the VAMSA Corporations without Upham's
24 knowledge or consent; and conspiring with Grau, ITL, Bustos and Marin to defraud Upham out
25 of his investment in the VAMSA Corporations.

26 101. As a proximate result of The Decedent's breach of his fiduciary duties to Upham,
27 plaintiff Upham has been damaged in the sum of at least \$3,000,000, plus interest and costs.

28 102. In addition, as a result of malicious and willful breach of fiduciary duties, Upham

1 is entitled to exemplary damages in an amount to set an example.

2 **THIRD CAUSE OF ACTION**

3 **(Conversion)**

4 **(Against All Defendants)**

5 103. Upham repeats, realleges, and incorporates herein by this reference each and
6 every allegation contained in Paragraphs 1 through 102 herein, inclusive.

7 104. Upham is informed and believes, and on that basis alleges, that The Decedent and
8 Grau have agreed to withhold Upham's share of the proceeds of the sale of Ventana al Mar.
9 Despite Upham's repeated requests, The Decedent, Grau and ITL have refused to account for or
10 remit such sum.

11 105. As a proximate result of The Decedent, Grau and ITL's conversion of Upham's
12 funds, Upham has been damaged in the sum of at least \$500,000, plus interest costs.

13 106. In addition, as a result of malicious and willful conversion, Upham is entitled to
14 exemplary damages in an amount to set an example.

15 **FOURTH CAUSE OF ACTION**

16 **(Intentional Misrepresentation)**

17 **(Against The Decedent)**

18 107. Upham repeats, realleges, and incorporates herein by this reference each and
19 every allegation contained in Paragraphs 1 through 106 herein, inclusive.

20 108. As set forth above, The Decedent repeatedly told Upham that: (1) he possessed an
21 option to purchase the VAMSA Corporation property from Bustos for \$600,000; (2) Bustos
22 owned the property; (3) title to the property was "clean;" (4) Marin had confirmed that Bustos
23 possessed unencumbered title to the property; (5) Upham would not have to take an active role in
24 the management of the VAMSA Corporations or the marketing or developing the property; (6)
25 The Decedent would transfer title to a portion of the Zona Uno property to Upham; (7) Upham
26 would be provided with a secure land base for his scuba diving business; (8) The Decedent
27 would provide Upham with accurate, monthly accountings; (9) Upham would recoup a minimum
28 of \$600,000 to \$1,500,000 on his investment in the VAMSA Corporations; (10) Grau and ITL

1 had paid all monies required under their agreement with The Decedent and Upham; (11) all
2 attorney's fees in connection with the Ventana al Mar sale and proper title to the property had
3 been timely paid; (12) the accountings sent to Upham represented accurate reflections of the
4 income and expenses of the VAMSA Corporations.

5 109. Upham is informed and believes, and on that basis alleges, that the foregoing
6 representations were in fact false when made, the true facts being that: (1) The Decedent's option
7 to "purchase" the property from Bustos was \$510,000; (2) Bustos did not own the property; (3)
8 title to the property was not "clean" as Stirling had a superior interest in the property; (4) Marin
9 did not properly investigate the Bustos' title to the property; (5) The Decedent lacked the skill
10 and experience necessary to properly manage the VAMSA Corporations or market and develop
11 the property and had no intention of doing so; (6) The Decedent never intended to transfer title of
12 any portion of Zona Uno to Upham; (7) Upham would not be provided with a secure land base
13 for his scuba diving business; (8) The Decedent had no intention of providing Upham with
14 accurate, monthly accountings, but rather intended to delay sending Upham accountings and then
15 sending him inaccurate accountings to cover up his fraudulent use of Upham's funds; (9) The
16 Decedent would convert Upham's funds and use them for his own benefit, depriving Upham of
17 any profit on his investment; (10) Grau and ITL have not paid the funds required under their
18 agreement with Upham, but rather have conspired with The Decedent to defraud Upham out of
19 his investment and shares of the VAMSA Corporations; (11) the accountings which The
20 Decedent sent to Upham were fraudulent and calculated to cover up his conspiracy with Marin,
21 Bustos, Grau and ITL to defraud Upham.

22 110. Upham is informed and believes, and on that basis alleges, that at the time The
23 Decedent made the foregoing representations of face he knew them to be false.

24 111. Upham is informed and believes, and on that basis alleges, that The Decedent
25 made each of the foregoing false representations with the intent to defraud Upham. Specifically,
26 The Decedent made the foregoing false representations for the purpose of inducing Upham to
27 rely upon them, and to induce Upham to act and refrain from acting in reliance thereon. At all
28 times, Upham was unaware of the falsity of the foregoing representations.

112. In justifiable reliance on The Decedent's misrepresentations, Upham invested more than \$300,000 in the VAMSA Corporations, refrained from taking a more active role in the management of the corporations or the marketing and development of the properties; agreed to sell his shares in Ventana al Mar to Grau; refrained from sooner investigating the true facts of the status of the VAMSA Corporations and the VAMSA Corporations' property; expended approximately \$880,000 to purchase and retrofit a commercial scuba diving boat with the understanding that he had a secure land base for his scuba diving operations in Costa Rica; extended time and money obtaining a Costa Rican tourist license to operate a scuba diving business; and expended time and money negotiating a franchise agreement with US Divers for an exclusive Costa Rican franchise.

113. As a proximate result of The Decedent's misrepresentations, Upham has been damaged in the sum of at least \$3,000,000 plus interest and costs.

114. In addition, as a result of malicious and willful fraud, Upham is entitled to exemplary damages in an amount to set an example.

FIFTH CAUSE OF ACTION

(Negligent Misrepresentation)

(Against The Decedent)

115. Upham repeats, realleges, and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 114 herein, inclusive.

116. As set forth above, The Decedent repeatedly told Upham that: (1) he possessed an option to purchase the VAMSA Corporation property from Bustos for \$600,000; (2) that Bustos owned the property; (3) title to the property was "clean;" (4) Marin had confirmed that Bustos possessed unencumbered title to the property; (5) Upham would not have to take an active role in the management of the VAMSA Corporations or the marketing or development of the property, but rather that The Decedent would handle all aspects of the management of the VAMSA Corporations and the marketing or development of the property; (6) The Decedent would transfer title of a portion of the Zona Uno property to Upham; (7) Upham would be provided a secure land base for his scuba diving business; (8) The Decedent would provide Upham with accurate,

1 monthly accountings; (9) Upham would recoup a minimum of \$600,000 to \$1,500,000 on his
2 investment in the VAMSA Corporations; (10) Grau and ITL had paid all monies required under
3 their agreement with The Decedent and Upham; (11) all attorney's fees in connection with the
4 Ventana al Mar sale and title to the property had been timely paid; (12) the accountings sent to
5 Upham represented accurate reflections of the income and expenses of the VAMSA
6 Corporations.

7 117. Upham is informed and believes, and on that basis alleges, that the foregoing
8 representations were in fact false when made, the true facts being that: (1) The Decedent's option
9 to "purchase" the property from Bustos was for \$510,000; (2) Bustos did not own the property;
10 (3) title to the property was not "clean" as Stirling had a superior interest in the property; (4)
11 Marin did not properly investigate Bustos' title to the property; (5) The Decedent lacked the skill
12 and experience necessary to properly manage the VAMSA Corporations or market and develop
13 the property and had no intention of doing so; (6) The Decedent never intended to transfer title of
14 any portion of the Zona Uno property to Upham; (7) Upham would not be provided with a secure
15 land base for his scuba diving business; (8) The Decedent had no intention of providing Upham
16 with accurate monthly accountings, but rather intended to delay sending Upham accountings and
17 then send him inaccurate accountings to cover up his fraudulent use of Upham's funds; (9) The
18 Decedent would convert Upham's funds and use them for his own benefit, depriving Upham of
19 any profit on his investment; (10) Grau and ITL have not paid the funds required under their
20 agreement with Upham, but rather have conspired with The Decedent to defraud Upham out of
21 his investment and shares of the VAMSA Corporations; (11) The Decedent has not paid the
22 attorney's fees in connection with the Ventana al Mar sale; (12) the accountings which The
23 Decedent sent to Upham were fraudulent and calculated to cover up his conspiracy with Marin,
24 Bustos, Grau and ITL to defraud Upham.

25 118. Upham is informed and believes, and on that basis alleges, that at the time The
26 Decedent made the foregoing representations of face he had no reasonable grounds for believing
27 them to be true.

28 119. Upham is informed and believes, and on that basis alleges, that The Decedent

1 made each of the foregoing false representations with the intent of inducing Upham to rely upon
2 them, and to induce Upham to act and refrain from acting in reliance thereon. At all times,
3 Upham was unaware of the falsity of the foregoing representations.

4 120. In justifiable reliance on The Decedent's misrepresentations, Upham invested
5 more than \$300,000 in the VAMSA Corporations; refrained from taking a more active role in the
6 management of the corporations or the marketing and development of the properties; agreed to
7 sell his shares of Ventana al Mar to Grau; refrained from sooner investigating the true facts of
8 the status of the VAMSA Corporations and the VAMSA Corporations' properties; expended
9 approximately \$880,000 to purchase and retrofit a commercial scuba diving boat with the
10 understanding that he had a secure land base for his scuba diving operations in Costa Rica;
11 expended time and money obtaining a Costa Rican tourist license to operate a scuba diving
12 business; and expended time and money negotiating a franchise agreement with US Divers for an
13 exclusive Costa Rican franchise.

14 121. As a proximate result of The Decedent's misrepresentations, Upham has been
15 damaged in the sum of at least \$3,000,000, plus interest and costs.

16 **SIXTH CAUSE OF ACTION**

17 **(Concealment of Material Facts)**

18 **(Against The Decedent)**

19 122. Upham repeats, realleges, and incorporates herein by this reference each and
20 every allegation contained in Paragraphs 1 through 121 herein, inclusive.

21 123. In addition to his direct misrepresentations to Upham, Upham is informed and
22 believes, and on that basis alleges, that The Decedent concealed and continues to conceal such
23 material facts known to him in order to induce Upham to invest in the VAMSA Corporations.
24 Specifically, The Decedent concealed from Upham the facts that Marin and Bustos each had
25 interests in parcels adjoining their VAMSA Corporation property.

26 124. Upham is informed and believes, and on that basis alleges, that The Decedent was
27 aware of the foregoing facts and was under a duty to disclose such facts from Upham by virtue of
28 his fiduciary duty to Upham. The Decedent intentionally concealed such facts and continues to

1 intentionally conceal such facts from Upham to induce him to invest in the VAMSA
2 Corporations and refrain from investigating the true facts regarding Bustos' alleged title to the
3 property. At all times, Upham was unaware of the foregoing facts and would not have invested
4 in the VAMSA Corporations or refrained from investigating Bustos' alleged title to the property
5 had he known such facts.

6 125. As a proximate result of The Decedent's concealment of material facts, Upham
7 has been damaged in the sum of at least \$3,000,000, plus interest and costs.

8 126. In addition, as a result of malicious and willful fraud, Upham is entitled to
9 exemplary damages in an amount to set an example.

10 **SEVENTH CAUSE OF ACTION**

11 **(Conspiracy to Breach Fiduciary Duties)**

12 **(Against All Defendants)**

13 127. Upham repeats, realleges, and incorporates herein by this reference each and
14 every allegation contained in Paragraphs 1 through 126 herein, inclusive.

15 128. Upham is informed and believes, and on that basis alleges, that each defendant
16 has entered into, participated in, or knowingly acquired the benefits of a continuing unlawful and
17 fraudulent scheme, plan, and conspiracy under and pursuant to which the defendants have
18 intended to and actually did assist The Decedent in breaching his fiduciary duties to Upham.
19 Pursuant to this conspiracy, defendants have made false representations to Upham; instructed
20 each other to refuse to remit Upham's money as required; commingled Upham's money and
21 applied it for their own personal benefit and profit; directed each other to not render a proper
22 accounting; refused to prepare or deliver proper marketing materials; refused to transfer title of a
23 portion of the Zona Uno property to Upham; and attempted to coerce Upham into relinquishing
24 ten percent (10%) of the shares of Zona Uno and Zona Dos Corporations in an effort to hinder,
25 delay and defraud Upham.

26 129. Upham is informed and believes, and on that basis alleges, that Marin and Grau,
27 as officers and directors of Marschu and ITL respectively, directly ordered, authorized and
28 participated in Marschu and ITL's tortuous conduct towards Upham.

130. Upham is informed and believes, and on that basis alleges, that The Decedent, Grau, Marin and Bustos entered into and participated in the conspiracy described above, as individuals for their individual advantage.

131. As a proximate result of defendants' wrongs, Upham has been damaged in the sum of at least \$3,000,000, plus interest and costs.

132. In addition, as a result of defendants' malicious and willful actions, Upham is entitled to exemplary damages in an amount to set an example.

EIGHTH CAUSE OF ACTION

(Conspiracy to Convert)

(Against All Defendants)

133. Upham repeats, realleges, and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 132 herein, inclusive.

134. Upham is informed and believes, and on that basis alleges, that each defendant has entered into, participated in, or knowingly acquired the benefits of a continuing unlawful and fraudulent scheme, plan, and conspiracy under and pursuant to which the defendants have intended to and actually did assist The Decedent, Grau and ITL convert Upham's monies. Pursuant to this conspiracy, defendants have made false representations to Upham; concealed material facts from Upham; instructed each other to refuse to remit Upham's money as required; commingled Upham's money and applied it for their own personal benefit and profit; directed each other to not render a proper accounting; refusing to prepare or deliver proper marketing materials; refused to transfer title of a portion of the Zona Uno property to Upham; and attempted to coerce Upham into relinquishing his remaining shares in the VAMSA Corporations in an effort to hinder, delay and defraud Upham.

135. Upham is informed and believes, and on that basis alleges, that Marin and Grau, as officers or directors of Marschu and ITL respectively, directly ordered, authorized and participated in Marschu and ITL's tortuous conduct towards Upham.

136. Upham is informed and believes, and on that basis alleges, that The Decedent, Grau, Marin and Bustos entered into and participated in the conspiracy described above, as

1 individuals for their individual advantage.

2 137. As a proximate result of defendants' wrongs, Upham has been damaged in the
3 sum of at least \$3,000,000, plus interest and costs.

4 138. In addition, as a result of defendants' malicious and willful actions, Upham is
5 entitled to exemplary damages in an amount to set an example.

6 **NINTH CAUSE OF ACTION**

7 **(Conspiracy to Defraud)**

8 **(Against All Defendants)**

9 139. Upham repeats, realleges, and incorporates herein by this reference each and
10 every allegation contained in Paragraphs 1 through 138 herein, inclusive.

11 140. Upham is informed and believes, and on that basis alleges, that each defendant
12 has entered into, participated in, or knowingly acquired the benefits of a continuing unlawful and
13 fraudulent scheme, plan, and conspiracy under and pursuant to which the defendants have
14 intended to and actually did assist The Decedent, Grau, ITL, Marin and Marschu to defraud
15 Upham. Pursuant to this conspiracy, defendants have made false representations to Upham;
16 concealed material facts from Upham; instructed each other to refuse to remit Upham's money as
17 required; commingled Upham's money and applied it for their own personal benefit and profit;
18 directed each other to not render a proper accounting; refused to prepare or deliver proper
19 marketing materials; refused to transfer title to a portion of the Zona Uno property to Upham;
20 and attempted to coerce Upham into relinquishing his ten percent (10%) of the shares of Zona
21 Uno and Zona Dos Corporations in an effort to hinder, delay and defraud Upham.

22 141. Upham is informed and believes, and on that basis alleges, that Marin and Grau,
23 as officer and directors of Marschu and ITL respectively, directly ordered, authorized and
24 participated in Marschu and ITL's tortuous conduct towards Upham.

25 142. Upham is informed and believes, and on that basis alleges, that The Decedent,
26 Grau, Marin, and Bustos entered into and participated in the conspiracy described above, as
27 individuals for their individual advantage.

28 143. As a proximate result of defendants' wrongs, Upham has been damaged in the

1 sum of at least \$3,000,000, plus interest and costs.

2 144. In addition, as a result of defendants' malicious and willful actions, Upham is
3 entitled to exemplary damages in an amount to set an example.

4 **TENTH CAUSE OF ACTION**

5 **(Accounting)**

6 **(Against All Defendants)**

7 145. Upham repeats, realleges, and incorporates herein by this reference each and
8 every allegation in Paragraphs 1 through 144 herein, inclusive.

9 146. The Decedent is required to remit an accounting, as fiduciary to Upham. Despite
10 repeated demands therefor, The Decedent has refused to remit an accurate accounting.

11 147. Upham is entitled to an order compelling The Decedent to account for his receipt
12 of Upham's funds, the application thereof, their distribution, and other matters material to his
13 fiduciary duty.

14 **ELEVENTH CAUSE OF ACTION**

15 **(Unjust Enrichment)**

16 **(Against All Defendants)**

17 148. Upham repeats, realleges, and incorporates herein by this reference each and
18 every allegation contained in Paragraphs 1 through 147 herein, inclusive.

19 149. Due to the improper and unlawful conduct alleged above, defendants would be
20 unjustly enriched were they permitted to retain the funds that Upham invested, and any profits,
21 commissions, fees, and other proceeds derived therefrom. Defendants should therefore be
22 ordered to return to Upham his total investment, plus interest and any other sums that defendants
23 have received in connection with Upham's investment.

24 **TWELFTH CAUSE OF ACTION**

25 **(Injunction)**

26 **(Against All Defendants)**

27 150. Upham repeats, realleges, and incorporates herein by this reference each and
28 every allegation contained in Paragraphs 1 through 149 herein, inclusive.

151. Due to the improper and unlawful conduct alleged above, plaintiff seeks this court to enjoin the defendants from transferring, selling or hypothecating any and all of the real property, corporate stock or any funds that Upham invested, and any profits, commissions, fees, and other proceeds derived there from.

152. On or about March, 1996, plaintiff and the decedent entered into a stipulation agreeing that neither party be allowed to transfer, assign, convey, encumber, pledge, mortgage, create a security interest in, conceal or in any manner whatsoever dispose of the whole or any part of any shares of the corporations or any asset of the corporation without the express prior written consent of the other party. The defendants must be mandatorily enjoined from any violation of the stipulation.

THIRTEENTH CAUSE OF ACTION

(Constructive Trust)

(Against All Defendants)

153. Upham repeats, realleges, and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 152 herein, inclusive.

154. Due to the improper and unlawful conduct alleged above, plaintiff seeks this court to impose a constructive trust as to any shares of the corporations or any asset of the corporation, any real property plaintiff invested in Costa Rica and all on all assets which were probated in South Carolina or assets that should have been probated in South Carolina and on all assets which were probated in Costa Rica or assets that should have been probated in Costa Rica.

FOURTEENTH CAUSE OF ACTION

(Fraud and Misrepresentation)

(Against Helena F. Fox)

155. Upham repeats, realleges, and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 154 herein, inclusive.

156. Defendant, Helena F. Fox, misrepresented the condition of her husband's estate in violation of South Carolina Probate Law, including but not limited to §62-3-1005; §62-3-1008; §62-3-1001(a)(4). This defendant remains liable to plaintiff pursuant to South Carolina Probate

1 Law §62-3-1004.

2 157. Plaintiff seeks punitive and exemplary damages against Helena F. Fox for her acts
3 and omissions as the duly appointed personal representative of the Estate of Peter M. Fox.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, plaintiff, Christopher Upham, prays for judgment against defendants as
6 follows:

7 **FIRST AND FIFTH CAUSES OF ACTION**

8 1. For damages in the amount of not less than \$3,000,000 plus interest, or an amount
9 according to proof at trial.

10 **SECOND, FOURTH, SIXTH, SEVENTH, EIGHTH AND NINTH CAUSES OF ACTION**

11 2. For damages in the amount of not less than \$3,000,000 plus interest, or in an
12 amount according to proof at trial.

13 3. For punitive damages in an amount to set an example.

14 **THIRD CAUSE OF ACTION**

15 4. For damages in the amount of not less than \$500,000 plus interest, or in an
16 amount according to proof at trial.

17 5. For recovery of all illegal profits made by defendants' refusal to remit Upham's
18 funds.

19 6. For punitive damages in an amount to set an example.

20 **TENTH CAUSE OF ACTION**

21 7. For an order compelling defendants to render an accounting of Upham's money
22 entrusted to their care.

23 **ELEVENTH CAUSE OF ACTION**

24 8. That the court order defendants to return to Upham all sums invested by Upham
25 in the VAMSA Corporations, as well as all profits, fees, commissions, and other proceeds
26 derived therefrom.

EXHIBIT “A”

Agreement made on January 10, 1992 between Christopher Upham, passport of the United States of America #052357148, resident of California, U.S.A. (hereinafter "Mr. Upham") and Peter M. Fox, passport of the United States of America #033809042, resident of Alajuela, Costa Rica (hereinafter "Mr. Fox");

Whereas

- A. Mr. Upham owns a 50% of the capital stock of each of the following Costa Rican corporations: Ventana al Mar, Sociedad Anónima (hereinafter "Ventana al Mar"); Zona Uno, Sociedad Anónima (hereinafter "Zona Uno") and Zona Dos, Sociedad Anónima (hereinafter "Zona Dos");
- B. Mr. Fox owns a 50% of the capital stock of Ventana al Mar, Zona Uno and Zona Dos;
- C. Ventana al Mar, Zona Uno and Zona Dos are all duly registered and in good standing according to Costa Rican laws;
- D. Ventana al Mar, Zona Uno and Zona Dos have recently acquired properties in Guanacaste, Costa Rica (hereinafter "the properties") and made a partial payment of US\$300.000,00 (three hundred thousand dollars, currency of the United States of America), leaving a balance owed to vendor of an amount identical to the above (hereinafter "Debt"), which is due on April 15, 1992.
- E. Mr. Fox acknowledges that the funds to make the first partial payment above referred were provided by Mr. Upham;
- F. Both parties agree that it is in their interest to sell the shares of Ventana al Mar as soon as possible, for a total price that must exceed US\$400.000,00 (four hundred thousand dollars);
- G. Mr. Upham wishes to assign, in case of his death, all rights and benefits derived from this agreement to his sister, Jennifer Upham.

Now, THEREFORE, for good consideration it is agreed between the parties as follows:

1. Responsibilities of the Parties:

- 1.1 Mr. Fox must keep under his personal name the capital stock he owns in each one of the three corporations, until the debt has been paid for.
- 1.2 Mr. Fox will provide the funds to pay the debt.
- 1.3 When debt is paid for, Mr. Upham will transfer to Mr. Fox a 20% of the capital stock he now owns in Zona Uno and Zona Dos.

- 1.4 If the capital stock of Ventana al Mar is sold before the date that the debt is due, both parties agree to use the funds of the sale to make the payment. Aside from making said payment, Mr. Fox will receive US\$100.000,00 (one hundred thousand dollars) and the balance, if any, will be destined to capitalize Zona Uno.
- 1.5 If the capital stock of Ventana al Mar is sold after the date that the debt is due, and the debt has been at that time paid with funds of Mr. Fox, both parties agree to use the funds of the sale to pay US\$300.000,00 (three hundred thousand dollars) back to Mr. Fox. Additional funds coming from the sale will be used in the same way as described in Clause 1.4
- 1.6 If Mr. Fox does not provide the funds to pay the debt, and Mr. Upham does, Mr. Fox will immediately transfer to Mr. Upham a 50% of the capital stock he owns in the three corporations. When the capital stock of Ventana al Mar is sold, Mr. Upham will get US\$300.000,00 (three hundred thousand dollars) plus a 75% of whatever balance is left. Mr. Fox will then receive a 25% of said balance.

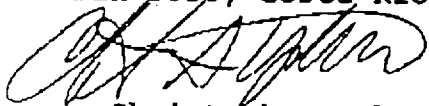
2. Warranties:

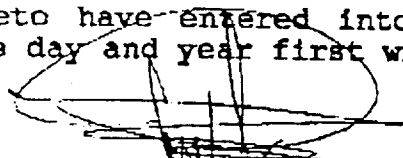
Each of the parties hereto represents and warrants to the other parties that it has the power to enter into this Agreement and perform its obligations as described herein and that it has taken all actions necessary to execute and deliver this Agreement, to fulfill its obligations and to consummate the transactions contemplated by it.

3. Amendments:

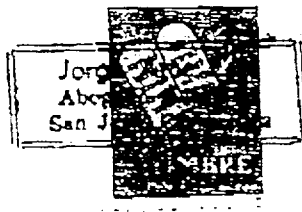
This Agreement may be amended only in writing signed by authorized representatives of the parties.

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement in San José, Costa Rica, the day and year first written above.


Christopher Upham


Peter Fox

The signatures are authentic:



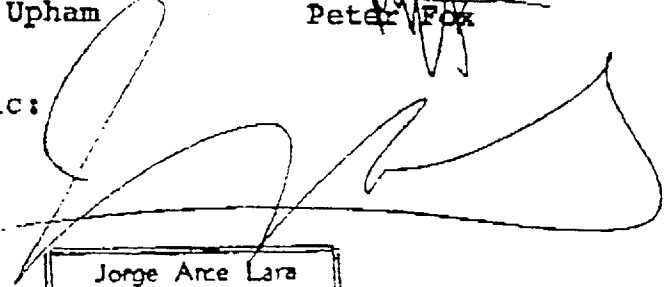

Jorge Arce Lara
Abogado
San José, Costa Rica

EXHIBIT “B”

Agreement made on July 19, 1992, between Christopher Upham, passport of the United States of America # 052357148 (hereinafter "Mr. Upham"); Peter Marlin Fox, passport of the United States of America # 033809042 (hereinafter "Mr. Fox") and Inmobiliaria Trem, Limitada, a Chilean corporation hereby represented by Mr. Sergio Grau Torm, passport of Chile # 4773964-0 (hereinafter "Inmobiliaria Trem");

Whereas:

A. Mr. Upham owns a 50 % of the capital stock of Ventana al Mar, S.A. and a 50 % of Zona Uno, S.A., both corporations duly organized under the laws of Costa Rica;

B. Mr. Fox owns a 50 % of the capital stock of Ventana al Mar, S.A. and a 50 % of Zona, Uno, S.A.;

C. Both Mr. Fox & Mr. Upham wish to sell to Inmobiliaria Trem their shares in Ventana al Mar, S.A., for a total price of US\$400.000,00 (four hundred thousand U.S. dollars);

D. Ventana al Mar, S.A. will have clear title to a property of 243 acres in Potrero, Guanacaste, Costa Rica (Lot B of title #070243-000);

Now, therefore, for good consideration it is agreed between the parties as follows:

1. Inmobiliaria Trem will pay Mr. Upham & Mr. Fox the amount of US\$150.000,00 (one hundred fifty thousand U.S. dollars) upon proof of clear title to the property owned by Ventana al Mar, S.A.

2. Twenty days after the above referred title has been registered, Inmobiliaria Trem will pay Mr. Upham the amount US\$60.000,00 (sixty thousand U.S. dollars) and Mr. Fox the amount of US\$90.000,00 (ninety thousand U.S. dollars).

3. When the stock of Ventana al Mar, S.A. is sold to a third party for an amount not less than US\$500.000,00 (five hundred thousand U.S. dollars), Inmobiliaria Trem will pay Mr. Fox the amount of US\$100.000,00 (one hundred thousand U.S. dollars).

4. Upon the receipt of the first US\$150.000,00 (one hundred fifty thousand U.S. dollars), both Mr. Upham & Mr. Fox will transfer to Inmobiliaria Trem their shares in Ventana al Mar, S.A.

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5. Mr. Upham & Mr. Fox have the right to sell the property for an amount not less than US\$500.000,00 (five hundred thousand U.S. dollars) before April 1, 1993. If this is completed, all the proceeds in excess of US\$500.000,00 (five hundred thousand U.S. dollars) will be paid to the accounts of Zona Uno, S.A. If the property is not sold before April 1, 1993, Inmobiliaria Trem will be free to sell it to their own benefit and profit.

This agreement may be ammended only in writing signed by authorized representatives of the parties.

In witness whereof, the parties hereto have entered into this agreement the day and year first above written.


Christopher Upham


Peter Martin

Inmobiliaria

